83-357

IN THE SUPREME COURT
OF THE UNITED STATES

JAMES LAWRENCE CUNNINGHAM,

Appellant,

v.

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Appellees.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT
OF THE UNITED STATES

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Does a state statutory scheme, construed to allow a married woman to assert the paternity of a married man, not her husband, but to deny a natural father standing to assert paternity and reestablish visitation with his child with whom he has established a substantial relationship solely because the mother cohabiting with him at the time of conception was still legally married to her now ex-husband, violate the due process and equal protection rights of the natural father and child.

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The Order of the Tennessee Supreme Court entered on May 31, 1983, the Opinion and Decree of the Tennessee Court of Appeals dated February 24, 1983, the Memorandum Opinion of the Fourth Circuit Court of Knox County, Tennessee delivered October 28, 1981, and the Order of the Fourth Circuit Court dismissing this cause dated December 7, 1981 are set out in the Appendix hereto. The decision of the Tennessee Court of Appeals is reported in 652 S.W.2d 910 (Tenn. App., 1983).

JURISDICTIONAL GROUNDS IN THIS COURT

This was a legitimacy proceeding brought under Tennessee Code Annotated §36-302 in the Fourth Circuit Court for Knox County, Tennessee, being the court of first instance, in which summary judgment was granted against Appellant on the basis of lack of standing to seek legitimation of this child under Tennessee Code Annotated §36-302 (hereinafter T.C.A.).

The federal consitutional question was timely raised by Appellant in the argument of the Motion for Summary Judgment in the Trial Court and has been continuously raised on appeal. On October 28, 1981 the Fourth Circuit Court for Knox County, Tennessee held for Appellees but did not address the meaning of the statute, basing his decision on the importance of the child's reputation, characterizing the Appellant as an interloper. On February 24, 1983 the

Tennessee Court of Appeals affirmed the decision of the Trial Court, adopting what Appellant submits is a strained construction of the applicable statute T.C.A. §36-302, defining the term "out of wedlock" to refer to the marital status of the mother, rather than the relationship of the parents. The Tennessee Court of Appeals did not pass on Appellant's assertion that the federal constitutional prohibition against denial of due process and equal protection would prohibit such a construction.

A timely application for permission to appeal was filed by Appellant on March 28, 1983 which asserted that the Court of Appeals' interpretation of the statute as being intended to apply only to children of unmarried women was an unconstituitonal interpretation, citing again as was cited in each court below Stanley v. Illinois, 405 U.S. 645 (1972) and Caban vs. Mohammed,

441 U.S. 380(1979). This application was denied on May 31, 1983. Notice of Appeal to this Court was timely filed on August 29, 1983.

The jurisdiction of the Supreme Court of the United States to review this decision of the Supreme Court of Tennessee denying permission to appeal from the decision of the Tennessee Court of Appeals, on appeal is conferred by 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Dahnke v. Walker Milling Company v. Bondurant, 257 U.S. 282(1921);

Lawrence v. State Tax Commission, 286 U.S. 276(1931);

Stanley v. Illinois, 405 U.S. 645;

Quillion v. Walcott, 434 U.S. 246;

Caban v. Mohammed, 441 U.S. 380;

Mills v. Habluetzel, 456 U.S. 91;

Pickett v. Brown, ___ U.S. ___, 103

S. Ct. 2199, 76 L. Ed.2d. 372 (1983); Lehr v. Robertson, ___ U.S. ___, 103 S. Ct. 2985, ___ L.Ed. 2d ___ (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant Tennessee statutes codified in Tennessee Code Annotated are as follows:

T.C.A. 36-301. Jurisdiction. -- The circuit, juvenile, probate and county courts have concurrent jurisdiction to legitimate children upon application by the natural father of said children. Said application may be filed in the county in which the father resides or in the county in which the children reside or are present when the application is made.

T.C.A. 36-302. Petition for Legitimation.- An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate such child, and setting forth the reasons therefor and the state and date of said child's birth.

T.C.A. 36-222. Definitions. -- As used in this chapter, unless the context clearly requires otherwise:

(1) "Child" means a child born out of lawful wedlock.
(2) "Mother" means the mother of a child born out of lawful wedlock.
(3) "Court" shall mean the juvenile court.

T.C.A. 36-223. Liability of father of child born out of wedlock.-- The father of a child born out of wedlock is liable for the necessary support and education of the child. He is also liable to pay for the child's funeral expenses. He is liable to pay for the expenses of the mother's confinement and recovery, and is also liable to pay such expenses, including counsel fees, in connection with her pregnancy as the court in its discretion may deem

proper.

T.C.A. 36-224. Petition to establish paternity--Time of filing--Jurisdiction--Issuance of warrant.--(1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

(2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishings of support. Provided, however, that the department of human services or any person shall be empowered to bring suit in behalf of any child under the age of eighteen (18) who is, or is liable to

become a public charge.

(3) For the purpose of this chapter original and exclusive jurisdiction is conferred upon the juvenile court.

(4) The petition shall be verified by affidavit and shall charge the person named as defendant with being the father of the child and shall demand that he be brought before the court to answer the charge.

(5) The court shall issue a warrant for the apprehension of the defendant, directed to any officer in the state authorized to execute warrants, commanding him without delay to apprehend the alleged father and bring him before the court, for the purpose of having an adjudication as to the paternity of the child, and such warrant may be issued to any county of this state. But in the discretion of the court, a summons may be issued as in civil cases.

T.C.A. 36-141. Release of information concerning biological family.-- Upon written request of an adopted person ...(7) available health history of the biological parents and other biological relatives of the adopted person specifically including any known information which would be expected to have a substantial effect on the adopted person's mental or physical health.

28 U.S.C. §2403(b) may be applicable.

STATEMENT OF THE CASE

The facts stated in the Appellant's sworn Petition for Legitimation and his Affidavits are as follows:

James Lawrence Cunningham is the father of Daniel Todd Inman, born on November 16, 1977 to him and the Appellee, Judy Baker Inman Golden. At the time that Daniel Todd Inman was conceived, Judy Golden was separated from the Appellee, Steven Lee Inman, now her ex-husband, and did not have conjugal access to him. After the child was born, the Appellant and the Appellee, Judy Golden, lived together in a relationship, reported in a pediatric history compiled from information supplied by Appellee Judy Golden, as "parents very loving of child and vice versa". The Appellee, Judy Golden, expressly admitted on numerous occasions to many people that the Appellant, James Cunningham, was the father of her child, Daniel Todd Inman,

including the nurse to whom she related the pediatric history of the child. The Appellant and Appellee, Judy Golden, lived together after the birth of their child for a substantial period of time during which the Appellant performed all the usual parental activities with respect to his son and after Appellee, Judy Golden, separated from him he gave her financial assistance for the benefit of the child, both at her request and voluntarily, and enjoyed visitation with his child for some time thereafter. Less than four months after the Appellant, James Cunningham and the Appellee, Judy Golden, separated, the Appellant filed his petition to legitimate his son. Appellee Golden sued Appellee Inman for divorce when Daniel was eight years old, and left Appellant when Daniel was 2½ years old, marrying Mr. Golden shortly before Appellant filed his petition for legitimation.

Previously, in the case of Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W. 2d 467 (1964), the Tennessee Court of Appeals construed a companion statute, T.C.A. §36-222, to allow a suit by a married woman against a married man to prove her child was not the child of her husband, so as to receive support from the natural father. That statute defined "child" as "a child born out of lawful wedlock" and "mother" as "the mother of a child born out of lawful wedlock".

T.C.A. §36-302 provides in important part that the circuit... courts have...jurisdiction to legitimate children upon application by the natural father... T.C.A. §36-202 speaks of "an application to legitimate a child born out of wedlock, the same term used in the paternity statute construed in McFerren, supra. At the Trial Court level Appellant argued that as the natural father and having had

extensive ties to his child he had standing to petition for legitimation and to prove the child was, in fact, his and to re-establish visitation. He cited Stanley v. Illinois, 405 U.S. 645 (1972), and Caban v. Mohammed, 441 U.S. 380 (1979) in support of his due process and equal protection claims. The Trial Court did not address the issues raised by the Appellant, and did not make any definitive findings of fact, concluding,

> "Well, when I get through you will have it to where you can get the issues addressed unless the appellate courts want to dodge the issue.
>
> In my judgment the interest of this child is the paramount issue in this particular matter. In my judgment there is nothing anyone has that that is more precious than their reputation. You bastardize the child, you have taken the very foundation of that reputation away. I find no basis for this lawsuit. This individual, as far as this Court is concerned, is an interloper. Why pick on this lady, why did he not pick on any other woman.
>
> Now he says he has reasons. In my judgment we have attempted to attempt to put in a nice word of palimony on, I think, an appropriate Army word of

> shacking up. And I think people who shack up just get what they get when they shack up, and they get no legal rights until the appellate court tells me they do."

Appellant, in his brief before the Tennessee Court of Appeals, addressed the issue of standing, citing Stanley v. Illinois, supra, Caban v. Mohammed, supra, and Craig v. Boren, 429 U.S. 190 (1976). The Tennessee Court of Appeals did not address any of the constitutional questions raised by the Appellant, but instead based their decision on what Appellant asserts is a strained construction of the statutory language "not born in lawful wedlock", and their discernment of the intent of the Legislature, notwithstanding their recognition that "there may be factual situations, perhaps even those present in this case, where the father should have a right to assert paternity, but we believe it is a perogative of the Legislature to enumerate the exceptional circumstances which would

permit such a suit".

That this construction was strained is further shown by the fact that the Court relied on Gower v. State, 155 Tenn. 138, 290 S.W. 978 (1927), but in fact, cited language quoted therein from two ancient common law cases and omitted the very next sentence after the quotation which stated, "Such, however, is not the law of Tennessee (290 S.W. at 980).

Appellant, in his application for permission to appeal to the Supreme Court of Tennessee, raised these inconsistencies and constitutional questions, citing Stanley v. Illinois, supra, Caban v. Mohammed, supra and the case of R. McG. v. J.W. (Colo., 615 P.2d 66 (1980)), a case which is very much in point and was decided for the natural father on a basis of equal protection grounds. The Tennessee Supreme Court denied the application for permission to appeal

without comment.

THE FEDERAL QUESTION IS SUBSTANTIAL

Appellant, James Lawrence Cunningham, is the father of Daniel Todd Inman, born November 16, 1977 to him and the Appellee, Judy Baker Inman Golden. Appellee Golden did not have conjugal access to her husband during the period that Daniel Todd Inman was conceived. Appellee Golden, after the birth of the child, divorced her husband and cohabited with Appellant Cunningham. She expressly admitted on numerous occasions to many people that he was the father and stated that he was the father in a pediatric history compiled on May 7, 1980. The Appellant, James Cunningham, while living in a relationship described in the pediatric history as "parents very loving of child and vice versa", performed all the usual parental

activities in caring for his son, as he did in subsequent visits after the Appellant and Appellee separated. Less than four months after their separation the Appellant filed the Petition for Legitimation in the Fourth Circuit Court of Knox County, seeking additionally to re-establish visitation with his son. After the separation, the Appellant Cunningham, gave the Appellee Golden financial assistance for the benefit of his son, both at her request, and voluntarily.

In Stanley v. Illinois, 405 U.S. 645 (1972), a case involving an unwed father who had intermittently lived with the mother of his three children for eighteen years, and after her death, sought custody of his children, this Court stated,

> "The private interest here, that of the man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care,

> custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"
> (405 U.S. 651 at 1212, citations omitted)

After reviewing various authorities this Court observed,

> "These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."
> (405 U.S. 652 at 1213)

In Caban v. Mohammed, 441 U.S. 380, this Court was dealing with a fact situation wherein a married man lived with a single woman between 1968 and 1973 and sired two children born in 1969 and 1971. Caban subsequently obtained a divorce from the first Mrs. Caban, and remarried in 1975. A legal struggle over custody and visitation ensued, and based on a New York statute which gave a putative father only a right to be heard in opposition to proposed step-father adoption, the New York Courts

afforded him only a hearing and did not consider him on an equal footing as a prospective adoptive parent. Notwithstanding the fact that Caban was married at the time of his cross-petition for adoption, married at the time of conception and birth of his two children, this court rightly characterized him as an "unwed father":

> "Indeed the Surrogate's decision in the present case, affirmed by the New Court of Appeals was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: ...(441 U.S. at 388)

In so characterizing a married man as an unwed father, we agree that the Court is making a correct analysis. A parallel analysis in the instant case would characterize Appellee Golden as an unwed mother, and the child as a child born out of wedlock, if Appellant Cunningham is successful in proving his

paternity. However, as the Tennessee Court of Appeals chose a strained construction of the legitimation statute, T.C.A. 36-302, inconsistent with this Court's analysis in Caban, Appellant asserts that this construction applied to the facts in his case, results in an impermissible gender-based distinction.

The facts in the case at bar demonstrate that Appellant, James Cunningham, had a substantial relationship which began while he was livng with his child until the child was about 2½ years old and with his subsequent visits which occurred during some of the four months between the parents separation and Appellant's filing of the legitimation petition. These facts clearly take the instant case outside the rule of Quillion v. Walcott, 434 U.S. 253 (1978) wherein Quillion

"Never exercised actual or legal

> custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." (434 U.S. at 256)

Appellant would further distinguish Quillion by pointing out that the Appellant in Quillion failed to raise a claim in his jurisdictional statement that the applicable statutes as they applied to him made gender-based distinctions in violation of the equal protection clause and this Court did not consider that claim. (434 U.S. 253, note 13)

Under the statutes struck down as unconstitutional in Caban, supra, the unwed mother had the authority to block the adoption of her child by witholding consent. The unwed father had no similar control even when his parental relationship was substantial. The statutory scheme in question in the case at bar, as it has been interpreted by the Tennessee Court of Appeals, permits an "unwed"

mother, even if she is married, to establish that an "unwed" father, even if he is married, is the father of the child, pursuant to T.C.A. §36-224, while the strained construction of T.C.A. §36-302 as interpreted by the Tennessee Court of Appeals would deny the unwed father the right to establish paternity through legitimation, solely because the "unwed" mother of the child was married, though separated, at the time of conception. Thus this statutory scheme as construed makes a gender-based distinction which cannot withstand judicial scrutiny under the equal protection clause.

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), this Court reiterated that

> "A parent's interest in the accuracy and injustice of the decision to terminate his or her parental rights is a commanding one."
> (452 U.S. at 27)

In Lehr v. Robertson, ___ U.S. ___,

103 S.Ct. 2985, ___ L.Ed.2d ___, (1983), this Court dealt with an unwed father who was trying to prevent a stepfather's adoption in order to pursue his attempts to establish regular visitation . The Court observed:

> "Jessica's parents are not like the parents involved in Caban...appellant never established any custodial, personal, or financial relationship with his [child]. If...the other parent has either abandoned or never established a relationship, the equal protection clause does not prevent a state from according the two parents different legal rights."
> (___ U.S. at ___, 103 S.Ct. at 2996-2997, ___ L.Ed.2d at ___).

This Court in Lehr distinquished Caban by pointing out:

> "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the in the rearing of his child' [Caban, 441 U.S. at 392], his interest in personal contact acquires substantial protection under the due process clause."
> (___ U.S. at ___, 103 S.Ct. at 2993, ___L.Ed.2d at ___).

Tennessee courts have, in a case involving an unmarried mother, and an

unwed father petitioning to set aside a completed adoption, gone far beyond Lehr. In In Re Riggs, 612 S.W.2d 461(Ct. of App. 1980), Tennessee and U.S. cert. den., the putative father, Terrazas had never supported or even seen the child, but had made efforts to find and get custody of the child. Rejecting the adoptive parents characterization of Terrazas as the mere "sperm impregnator" of the birth mother, the Court concluded

> "In the instant case, the [putative father] established, through his sperm and through his efforts to find his natural child, such a relationship with the child as to entitle him to due process of laws in any proceeding adverse to his parental rights."
> (612 S.W.2d at 468)

The Court then upheld the Chancellor's award of exclusive custody of the child to Terrazas, setting aside the Georgia adoption, and thus removing the 1¼ year old child from its adoptive home where he had been since 3 days after birth.

In Frazier v. McFerren the Tennessee Court of Appeals allowed a married mother, still married to the husband to whom she was married when she conceived her child, to prove her husband was not the father, and to further prove that a married man was the father. The only interest was child support. i.e. the "shifting economic arrangements" referred to in Stanley (405 U.S. at 651) as not requiring protection. There was no showing in McFerren that the child would suffer without this child support, and this was not a case brought by the state to recoup "welfare payments". In neither Tennessee case cited above was the Court at all concerned that

> "a statute which was enacted for the benefit of children could be used to make those presumed in law to be legitimate illegitimate so that they then could be made legitimate again."

as the Tennessee Court of Appeals was in the instant case. (Appendix p. 46)

Tennessee denies Appellant and his child equal protection when it does not afford them the substantive due process rights afforded in In Re Riggs and McFerren, supra.

This Court in Pickett v. Brown, ___ U.S. ___, 103 S.Ct. 2199 , 76 L.Ed.2d 372 (1983) was quick to point out that in paternity actions it is "the child's interests that are at stake." (___ U.S. at ___, 103 S.Ct. at 2208, n. 15, 76 L.Ed.2d at 385). Moreover, this Court has stated that "it is the child who has an interest in establishing a relationship to his father" in addition to its interest in obtaining paternal support.(Id, n. 13). Justice O'Connor also emphasized an extremely relevant point in her concurring opinion in Mills when she stated "the mother's and child's interests are not congruent". (456 U.S. at 105, n. 4)

Appellant and Daniel Todd should

receive full-blown due process and equal protection rights under the Fourteenth Amendment. However, the Tennessee statutory scheme as interpreted by the Appeals Court penalizes Daniel Todd by not allowing him to know, love, and receive support from his natural father, and thus according to the fundamental concepts of ordered liberty protected by the due process and equal protection clauses of the Fourteenth Amendment, the mother should not have an unqualified right to refuse to cooperate in legal proceedings intended to determine the paternity of her child when the father has no similar right to refuse cooperation in a paternity action. In a case such as the present the child has a right to know its father and the father and the child have a right to continue a substantial, loving, and familial relationship.

The Tennessee Court of Appeals in

the instant case recognizes that T.C.A. §36-302 was enacted for the benefit of children, but totally disregards the true interest of children to know their natural father and to share a natural, loving parent-child relationship with him. It also ignores the need of the child to know who his father is for medical reasons which could have far-reaching effects on his health. Before this case was decided in the Tennessee Court of Appeals, the Tennessee Legislature recognized these benefits by providing in T.C.A. §36-141 a method for adoptive parents or adopted children to discover,

> "Available health history of the biological parents and other biological relatives of the adopted person specifically including any known information which would be expected to have a substantial effect on the adopted person's mental or physical health." (T.C.A. §36-141(7))

Tennessee would treat Daniel Todd

Inman differently in denying him the right to know who his natural father is and to continue a substantial relationship with him by saying, 'But you have a presumed father, your mother's ex-husband. Therefore, you are presumed legitimate and thus not entitled to the protection that Gomez v. Perez, 409 U.S. 535 (1973) and Pickett, 76 U.S. 372 , 103 S.Ct. 2199, ___ L.Ed.2d ___ (1983) afford illegitimate children.' By saying this the state sets up a third category of children who will not be afforded the rights of the other two categories: the actual children of married parents will know their father; the "illigitimate" children of married and unmarried men may know their father, so long as their mother was unmarried at the time of conception; and those such as Daniel Todd who may not know their father because their mother was married, to a man not the father of her child, at the time

of conception.

The Tennessee Court of Appeals makes no attempt to justify these classifications as having "an evident and substantial relation to the particular...interests [the] statute is designed to serve." (United States v. Clark, 445 U.S. 23, 27 (1980), citing Lalli v. Lalli, 439 U.S. 259,268 (1978)). Nor could it.

The Supreme Court of Colorado in R. McG. and C.W. v. J.W., 615 P.2d 666, (1980), a case very similar to the case at bar, but with less compelling facts, considered the interests of the child, and intimated that the best interests of the child were not co-extensive with those of his mother's husband. After an equal protection analysis, the Court concluded that R. McG. could proceed to prove his paternity of a child born to J.W. while she was married to W.W., to whom she was married continuously from

the time of conception.[1] See also the well-reasoned dissent of Chief Justice Rose in A v. X,Y, and Z, 641 P.2d 1222, 1228 (1982).

1 This Court has not, as far as Appellant has determined, heard a case where the HLA blood tests were used to prove rather than disprove paternity. This Court has recognized their accuracy to disprove paternity. Mills v. Habluetzel, 456 U.S. 91, 98, n.4 (1982), Little v. Streater, 452 U.S. 1, 6 (1981). Many state courts, including the Colorado Supreme Court, have recognized the accuracy of these tests to prove paternity. In R. McG. HLA tests found a 98.89% certainty of paternity. See also Buechlers v. Vinsand, (Iowa, 318 N.W.2d 208, 1982), 98.06%; Varney v. Young, (Mich. App., 308 N.W.2d 276, 1981), 96.6%; McGarrity v. Mengel, (Pa., 429 A.2d 1162, 1981),98%; Calahan v. Landry, (La. App., 402 So.2d 782, 1981), 99.06%; G. v. G., (Tx. App., 647 S.W.2d 74, 1983), 98.9%; FJF v. FMF, (So. Dak., 512 N.W.2d 718, 1981), 97.27%; Crane v. Crane, (Idaho, 662 P.2d 538, 1983), 98.98% and others. These cases demonstrate that paternity as well as non-paternity can be determined with great certainty, so that there is little danger of incorrect determinations.

CONCLUSION

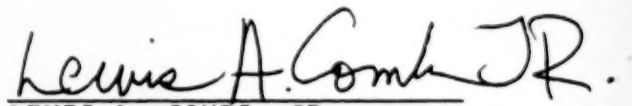
In Stanley v. Illinois, Quillion v. Walcott, Caban v. Mohammed, and Lehr v. Robertson this Court has set the standards to measure those interests of a biological father in his child deserving of constitutional protection. Pickett v. Brown emphasizes the interests of the child in knowing his natural father.

This appeal presents the parental rights of a father who lived with, cared for, and supported his child, and concerns his child's right to know his natural father and continue their "very loving" relationship. These substantial relationships deserve protection under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, especially because of Tennessee's recognition of lesser rights under McFerren and Riggs.

This Court should therefore note

jurisdiction and give plenary consideration to the constitutional rights of unwed fathers and their children to continue their substantial, loving relationships.

Respectfully Submitted,



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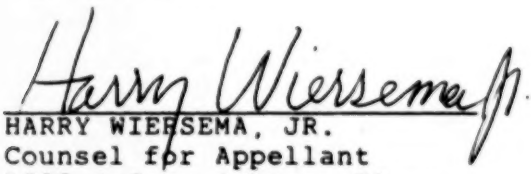

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JAMES LAWRENCE CUNNINGHAM,

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JUDY BAKER INMAN GOLDEN
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Appellees.

APPENDIX

IN THE FOURTH CIRCUIT COURT
FOR KNOX COUNTY, TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Petitioner

FILED
Mar 25 1982

v.

No. 28077

JUDY BAKER INMAN GOLDEN,

Respondent and
Counter-Plaintiff

and

STEVEN LEE INMAN,

Respondent

TRANSCRIPT OF PROCEEDINGS
(MEMORANDUM OPINION)
October 28, 1981

THE COURT: Well, when I get through you will have it to where you can get the issues addressed unless the appellate courts want to dodge the issue.

In my judgment the interest of this child is the paramount issue in this particular matter. In my judgment there is nothing that anyone has that is more precious than their reputation.

You bastardize the child, you have taken the very foundation of that reputation away. I find no basis for this lawsuit. This individual, as far as this Court is concerned, is an interloper. Why pick on this lady, why did he not pick on any other woman.

Now, he says he has reasons. In my judgment we have attempted to attempt to put a nice word of palimony on, I think, an appropriate Army word of shacking up. And I think people who shack up just get what they get when they shack up, and they get no legal rights until the appellate court tells me they do.

And the suit will be dismissed.

(whereupon, the hearing was ended.)

March 8, 1982

[Signed]
George S. Child, Jr.
Judge

IN THE FOURTH CIRCUIT COURT
FOR KNOX COUNTY, TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Petitioner and
Counter-Defendant,

v. No. 28077

JUDY BAKER INMAN GOLDEN.

Respondent and
Counter-Plaintiff,

and

STEVEN LEE INMAN,

Respondent.

ORDER

This cause came on to be heard before the Honorable George S. Child, Jr., Judge of the Fourth Circuit Court for Knox County, Tennessee, on October 28, 1981, upon the Complaint of the Petitioner, the Respondent's Motion for Summary Judgment, the argument of counsel, and from the entire record, it appearing to the Court that there is no genuine issue

of material fact in this cause, and the Court finds that the Respondents are entitled to a judgment as a matter of law, because Petitioner does not have standing to contest the paternity and dispute the legitimacy of Respondent's child and the interest of the child in retaining his current status of legitimacy is paramount.

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. That the Complaint filed by the Petitioner in this cause is dismissed with predjudice.

2. That summary judgment is hereby granted in favor of the Respondents on the Petition for Legitimation.

3. The memorandum opinion of this Court is incorporated herein by reference as if copied herein verbatim.

4. The costs in this cause are to be taxed against the Petitioner, for which execution may issue if necessary.

ENTER this the 7th day of December, 1981.

/S/
JUDGE

APPROVED FOR ENTRY:

/S/
LEWIS A. COMBS, JR.
Attorney for James Lawrence Cunningham

/S/
WILSON S. RITCHIE
Attorney for Judy Baker Inman Golden

/S/
FRANK L. FLYNN, JR.
Attorney for Steven Lee Inman

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

JAMES LAWRENCE CUNNINGHAM,	FILED Feb 24 1983
Plaintiff-Appellant	Knox Law C.A. #861
v.	
JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN,	Hon. Goerge S. Child, Jr. Judge
Defendants-Appellees	AFFIRMED

LEWIS A. COMBS, JR. and HARRY WIERSEMA, JR. OF KNOXVILLE FOR APPELLANT

WILSON S. RITCHIE and ANN C. SHORT OF KNOXVILLE FOR JUDY BAKER INMAN GOLDEN

FRANK L. FLYNN, JR. OF KNOXVILLE FOR STEVEN LEE INMAN

OPINION

Goddard, J.

James Lawrence Cunningham, Plaintiff-Appellant, appeals dismissal by summary judgment of his suit against Judy Baker Inman Golden and Steven Lee Inman, Defendants-Appellees. The critical issue raised is whether the Trial Court was

correct in finding that the material facts show without dispute that the Plaintiff could not assert his paternity of Mrs. Golden's minor child who was conceived and born while Mrs. Golden was separated from but engaging in conjugal visits with her husband, Steven Lee Inman.

The controlling statutes are found in Chapter 3 of Title 36, T.C.A., particularly Section 36-302, which provides as follows:

> 36-302. Petition for legitimation.- An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate the child, and setting forth the reasons therefor and the state and date of said child's birth.

The Defendants contend that the father cannot bring this case under Chapter 3 because the child was born in wedlock. On the other hand, the Appellant contends that because he is the father of the child, the child was born out of wedlock, and that he is properly maintaining the suit.

Before addressing the case specifically,

it is well to remember that proceedings to legitimate children, whether at the instance of the mother or the putative father, were unknown at common law and are exclusively a creature of the Legislature and that the forerunner of the statute under consideration here was adopted as Chapter 2 of the Public Acts of 1805.

Reduced to its simplest forms, this case turns on whether "out of lawful wedlock" should be read to mean only an unmarried woman or to include a married woman who is not married to the father of the child.

Our research discloses only one jurisdiction[1] which has given the language the former meaning, while a number of others[2] all of which are suits initiated by the mother - adopt the latter.

One Tennessee case has also touched on the question. In Frazier v. McFerron,

55 Tenn. App. 431, 402 S.W.2d 467 (1964), the Court was dealing with a suit brought under Chapter 2 of Title 36, the bastardy statute. Judge Carney points out that there seems to be a contradiction between the definition sections which speak of a child born out of wedlock and a later section of the statute which states that the mother and her husband may be competent witnesses, thus implying that a child is born out of wedlock only when the mother is unmarried.

In resolving the question, we note that our courts have repeatedly spoken of the presumption of legitimacy accorded a child born in wedlock.[3] Mr. Chief Justice Green reiterated the doctrine in Gower v. State, 155 Tenn. 138, 142, 290 S.W. 978, 980 (1927), detailing its origin under the English law:

> There is everywhere a presumption that a child born in wedlock is legitimate. It was the common law that, if the husband be within the four seas

(that is, within the jurisdiction of England), and his wife have issue, no evidence is admissible to prove the child a bastard, except in the sole case of an apparent impossibility of procreation by the husband - as of his not having attained the age of puberty, etc. Cannon v. Cannon, 26 Tenn. (Humph) 410.

This presumption obtained as to a child born in marriage, no matter how soon after the marriage a birth followed; that is to say, the child was presumed to be legitimate, unless it was shown that the husband was impotent or beyond the four seas during the period when the child must in the course of nature have been begotten. Jackson et al. v. Thornton et al., 133 Tenn. 36, 179 S.W. 384.

As to children born after the death of the father, the common law went to extraordinary lengths to hold them legitimate:

"In the time of Edward II, the Countess of Gloucester bore a child one year and seven months after the death of the duke, and it was pronounced legitimate. In the reign of Henry VI Mr. Baron Rolfe expressed the opinion with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation." [which leads one to question the gentleman's opinions or the lady's prior reputation] Dickinson's Appeal, 42 Conn. 491, 19 Am Rep. 553.

If the Plaintiff is correct that

"born out of lawful wedlock" means a child born to a woman who is not married to the father, it would seem to follow that "a child born in lawful wedlock" would mean a child born to a woman married to the father. Thus, by definition, the child would be legitimate and no presumption need be indulged. We conclude that for this presumption of legitimacy to make sense a child born in wedlock must mean a child born to a married woman and a child born out of wedlock one born to an unmarried woman.

Moreover, we are persuaded that in 1805, or for that matter in 1955, when the statute was codified, the Legislature intended to make it applicable only to children of unmarried women, and did not intend that a married woman living happily with her husband and three children should be forced into court to respond to a petition of this type filed by

a man who might allege only a single isolated indiscretion.

It is true that the facts of the case at bar are more aggravated than those above postulated, but if we permit the Plaintiff to proceed in this case, thus putting Mrs. Golden to her proof, it would also be necessary to permit the man in the case hypothesized to also proceed and require the woman to also respond. In this regard we recognize that there may be factual situations, perhaps even those present in this case, where a father should have a right to assert his paternity, but we believe it is the prerogative of the Legislature to enumerate the exceptional circumstances which would permit such a suit.

Further, we believe that there is some merit in the Defendants' argument that these Code Sections contemplate a non-adversarial proceeding, such as those

relating to a change of name. T.C.A. 29-8-101--105.

Finally, it seems anomalous to us that a statute which was enacted for the benefit of children could be used to make those presumed in law to be legitimate illegitimate so that they then could be made legitimate again.

For the foregoing reasons the Trial Court is affirmed and the cause remanded for collection of costs below. The costs of appeal are adjudged against the Plaintiff and his surety.

/S/
HOUSTON M. GODDARD,
Judge

CONCUR:

/S/
Clifford E. Sanders, J.

/S/
Herschel P. Franks, J.

1 Commonwealth Department v. Helton, 411 S.W.2d 932 (Ct. App.Ky. 1967).

2 Pursley v. Hisch, 85 N.E.2d 270 (Ind.Ct.App.1949); State v. Coliton, 17 N.W.2d 546 (N.D.1945); F. v. H., 546 P.2d 765 (Ore.Ct.App. 1976); Commonwealth v. Shavinsky, 101 A.2d 178 (Pa. Super. Ct. 1953).

3 Jackson, et al. v. Thornton, et al., 133 Tenn. 36, 179 S.W. 384 (1915); Cannon et ux. v. Cannon, et al., 26 Tenn. 410 (1846); Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467 (1964); Anderson v. Anderson, 52 Tenn.App. 241, 372 S.W.2d 452 (1962); State ex rel. Hardesty, et al. Sparks, et al., 28 Tenn.App. 329, 190 S.W.2d 302 (1945).

IN THE COURT OF APPEALS
EASTERN DIVISION
AT KNOXVILLE, TENNESSEE

DECREE

FILED
FEB 24, 1983

JAMES LAWRENCE CUNNINGHAM,

Plaintiff-Appellant,

v.

Knox Law

JUDY BAKER INMAN GOLDEN

Defendants-Appellees

AFFIRMED and REMANDED

This cause coming on to be heard upon a transcript of the record from Circuit Court of Knox County, assignments of counsel, upon consideration whereof the Court is of the opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that this case be and hereby is remanded to the Circuit Court of Knox County for

entry and enforcement of its final order as here affirmed, for collection of the costs adjudged in the trial court, and for any further proceedings necessary consistent with the opinion of this Court, a copy of which shall accompany the procedendo upon the remand to the court below.

The costs of this appeal are adjudged in this Court against the plaintiff-appellant, James Lawrence Cunningham, and for which let execution issue.

Goddard, J.
Sanders, J.
Franks, J.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JAMES LAWRENCE CUNNINGHAM,

Plaintiff-Appellant

FILED
May 31, 1983

v.

Knox Law

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Defendants-Appellees

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellees, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the Appellant.

PER CURIAM

IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Appellant,

v. C.A. No. 28077

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Appellees

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James Lawrence Cunningham, the Appellant above named, hereby appeals to the Supreme Court of the United State from the final order denying permission to appeal, entered herein on May 31, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

/S/
Harry Wiersema, Jr.
Attorney for James
Cunningham

/S/

Harry Wiersema, Jr.
Attorney for James Cunningham
Suite 1200, Andrew Johnson Plaza
912 South Gay Street
Knoxville, Tennessee 37902
615-524-7496

CERTIFICATE OF SERVICE

I, Harry Wiersema, Jr., hereby certify that a true and exact copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed with postage prepaid to the Attorney General of the State of Tennessee, William M. Leech, Jr., 450 James Robertson Parkway, Nashville, Tennessee 37219; Wilson S. Ritchie, Suite 2301, United American Plaza, Knoxville, Tennessee 37929-2301, attorney for Appellee Judy Baker Inman Golden; and Frank L. Flynn, Suite 600, Walnut Building, Knoxville, Tennessee 37901, attorney for Steven Lee Inman, this 29th day of August, 1983.

/S/

Harry Wiersema, Jr.
Attorney for Appellant
Suite 1200, Andrew Johnson Plaza
912 South Gay Street
Knoxville, Tennessee 37902
615-524-7496

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

1983 Term

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
and
STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
TENNESSEE COURT OF APPEALS
EASTERN SECTION

APPELLEES' MOTION TO DISMISS

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(615) 524-5353
Counsel of Record for the Appellees

QUESTION PRESENTED

Do the Tennessee legitimation and paternity statutes, judicially construed to permit a married woman to assert that a man other than her husband fathered her child, but construed to deny an alleged natural father standing to legitimate a child born to a married woman, violate the due process and equal protection rights of the alleged father?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

1983 Term

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
and
STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
TENNESSEE COURT OF APPEALS
EASTERN SECTION

MOTION TO DISMISS

The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN respectfully move this Court to dismiss the appeal brought by the appellant JAMES LAWRENCE CUNNINGHAM on the ground that the question presented by this appeal is not substantial enough to require plenary consideration.

STATEMENT OF THE CASE

This appeal brought by the appellant JAMES LAWRENCE CUNNINGHAM is from the decision of the Tennessee Court of Appeals in Cunningham v. Golden, 652 S.W.2d 910 (Tenn. Ct. App.) (appeal denied, Tenn. May 31, 1983), which denied him standing to file a petition for the legitimation of a minor child, DANIEL TODD INMAN, who was born to the appellee JUDY BAKER INMAN GOLDEN while she was married to the appellee STEVEN LEE INMAN. This appeal presents the question whether a state statute that has been construed to deny an alleged natural father standing to rebut the presumption of legitimacy of a child born to a married woman violates the equal protection or due process rights of the putative father.

On November 16, 1977, the appellee

JUDY BAKER INMAN gave birth to a son, DANIEL TODD INMAN. (R. 1, 15) At that time, and at the time the child was conceived, JUDY BAKER INMAN was married to the appellee STEVEN LEE INMAN. (R. 1, 12, 15, 18) About a year after the child's birth, the appellees were divorced on the ground of irreconcilable differences. (R. 6, 34-35) Pursuant to the marriage settlement agreement executed by the couple and incorporated by reference into the final decree of divorce, JUDY BAKER INMAN received custody of the child, and STEVEN LEE INMAN received visitation rights and a child support obligation of $150.00 a month. (R. 6, 38)

On September 9, 1980, nearly two years after the appellees were divorced and almost three years after DANIEL TODD INMAN was born, the appellant JAMES LAWRENCE CUNNINGHAM filed

a petition for legitimation in the Fourth Circuit Court for Knox County, Tennessee. He asserted that he was the natural father of DANIEL TODD INMAN and requested that, upon a hearing of the matter, the child be declared not born in lawful wedlock and thereafter duly legitimated. (R. 1-3) The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN jointly acknowledged parentage of the child, and they opposed the petition for legitimation. (R. 4, 15-20) On August 14, 1981, the appellant filed a motion to require the appellees and their child to submit to blood grouping tests to determine whether the appellant or the appellee STEVEN LEE INMAN could be excluded as the father of the child. Before the motion was heard, the appellees moved for summary judgment on the ground that the appellant as a matter of law lacked

standing to assert his paternity of the child. (R. 24-33) After oral argument on the summary judgment motion, the court on October 28, 1981, held that the appellant did not have standing to contest the paternity of the child, and that the interest of the child in preserving his status of legitimacy was paramount. (R. 22-23) On December 7, 1981, the court dismissed the appellant's petition with prejudice and granted summary judgment for the appellees. (R. 41) On February 24, 1983, the Tennessee Court of Appeals, Eastern Section, affirmed the trial court's decision and assessed costs against the appellant. The Supreme Court of Tennessee, per curiam, denied the appellant's application for leave to appeal on May 31, 1983. The appellant's Jurisdictional Statement before this Court was served on August 29, 1983, and, counsel

for the appellees having obtained a time extension, this Motion to Dismiss was timely filed.

The appellees believe that the question as presented by the appellant assumes the existence of facts never established in a judicial proceeding. Accordingly, the appellees have rephrased the question in what they believe is a more objective fashion. In addition, the child is not a party to the proceedings, and the appellees believe that the appellant lacks standing to assert constitutional arguments on behalf of the child. For this reason, the appellees have deleted the appellant's reference to the child's constitutional rights from the question presented.

No statutes or constitutional provisions other than those set forth by the

appellant are necessary for the resolution of this Motion to Dismiss. These provisions appear in the Jurisdictional Statement at 5-8 and are not repeated here.

ARGUMENT

THE QUESTION PRESENTED BY THIS APPEAL IS NOT SUBSTANTIAL ENOUGH TO WARRANT PLENARY CONSIDERATION.

The presumption that a child born to a married woman is the child of her husband, and therefore legitimate, is one of the oldest presumptions known to the law. Over two centuries ago, Lord Mansfield stated: "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage . . . . [I]t is a rule founded in decency, morality, and policy . . . ." Goodnight v. Moss, 98 Eng. Rep. 1257 (1777). The appellant JAMES LAWRENCE CUNNINGHAM asks this Court to consider whether a state statute that does not confer standing upon an alleged natural father to rebut the presump-

tion of legitimacy of a child born to a woman married to another man at the time of conception and birth violates the equal protection and due process rights of the alleged father. Because such a statute does not violate equal protection or due process guarantees, this case does not merit plenary consideration, and this Court should dismiss the appeal.

A. TENN. CODE ANN. § 36-302, AS INTERPRETED BY THE TENNESSEE COURT OF APPEALS, DOES NOT VIOLATE A PUTATIVE NATURAL FATHER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

The appellant JAMES LAWRENCE CUNNINGHAM, the alleged natural father in this case, argues that Tenn. Code Ann. § 36-302 (1977), as interpreted by the Tennessee Court of Appeals in Cunningham v. Golden, 652 S.W.2d 910 (Tenn. Ct. App.) (appeal denied, Tenn. May 31, 1983), denies him equal protection of the laws in contravention of the fourteenth amendment to the United States Constitution. Specifically, he contends that § 36-302, which does not confer standing upon a putative natural father to challenge the presumption of legitimacy of a child born to a woman married to another man, creates an impermissible gender-based classi-

fication when read in conjunction with Tenn. Code Ann. § 36-224 (1977), which allows a mother to bring an action to establish paternity and compel child support. (See Appellant's Jurisdictional Statement at 15-20) For the reasons discussed below, the appellant's argument is without merit.

Chapter 3 of title 36 of the Tennessee Code, §§ 36-301 to 36-309, sets forth procedures for the legitimation of children. Section 36-302 provides: "An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate such child, and setting forth the reasons therefor and the state and date of said child's birth." (Emphasis added.) In Cunningham v. Golden, supra, 652 S.W.2d at 912, the Tennessee Court of Appeals construed the phrase "a child not

born in lawful wedlock" to mean a child born to an unmarried woman, and consequently held that an alleged natural father of a child born to a woman married to another man had no standing to petition for the child's legitimation.

Chapter 2 of title 36 of the Tennessee Code, §§ 36-222 to 36-236, concerns bastardy proceedings. Section 36-224 provides in part:

> (1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or

> is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

(Emphasis added.) Section 36-222, which defines terms used in the chapter, provides that "child" means "a child born out of lawful wedlock," and "mother" means "the mother of a child born out of lawful wedlock." In Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467, 471 (cert. denied, Tenn. Dec. 11, 1964), the Tennessee Court of Appeals construed the statutes to allow a woman who had borne a child while married to bring a paternity action against a man not her husband.

Section 36-302 itself does not create an impermissible classification based upon

gender. The statute permits any person wishing to legitimate a child born to an unmarried woman to file a petition in the appropriate court. Because only men can legitimate children, the statute of necessity applies only to persons of that sex. Any alleged gender-based discrimination must arise from the joint operation of sections 36-302 and 36-224, as interpreted by the Tennessee courts.

Gender-based classifications are not ipso facto invalid. In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 468 (1981), this Court discussed the appropriate standard of judicial review for legislative classifications based upon gender. Citing Stanton v. Stanton, 421 U.S. 7 (1975) (gender-based classifications are not "inherently suspect" and do not require

"strict scrutiny"), Reed v. Reed, 404 U.S. 71 (1971) (gender-based classifications must bear a "fair and substantial relationship to legitimate state ends"), and Craig v. Boren, 429 U.S. 190 (1976) (gender-based classifications must bear a "substantial relationship to important governmental objectives"), this Court stated:

> Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes, 441 U.S. 347, 354 . . . (1979) (Stewart, J., plurality). But because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), . . . this Court has

> consistently upheld statutes where the gender classification is not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances.

450 U.S. at 468 (parallel citations omitted).

Statutes that do not allow a man to petition for legitimation of a child born to a married woman, but permit a married woman to bring a paternity action against a man not her husband, bear a substantial relationship to important governmental objectives. When a married woman bears a child fathered by someone other than her husband, the law nevertheless presumes the child to be the husband's, thereby creating a family unit of mother, legal father, and legitimate child. A state has a strong interest in maintaining this family unit and preserving the child's legitimate status. Even if the mother and legal

father become divorced, the state has a continuing interest in protecting the child's legitimacy and the child's ongoing relationship with his or her legal father. Allowing a putative natural father, who is a stranger to the family unit, to disrupt the family and bastardize the child would totally defeat these substantial state interests, and the child would gain nothing thereby. Permitting the mother, who is part of the family unit, to bring an action to establish the paternity of and compel child support from a man not her husband also might disrupt the family unit, but, as in Frazier v. McFerren, supra, might be necessitated by the legal father's unwillingness or inability to support the child. The member of the family, not the outsider, is in the best position to judge whether disruption of the family unit in

order to obtain child support would be in the child's best interests.

Thus the line drawn by §§ 36-302 and 36-224 actually distinguishes between an outsider to the family unit, the alleged natural father, and an insider, the mother, and the resulting gender-based distinction is merely incidental. Under either the "rational basis" or the "intermediate" standard of review, however, the statutes do not deny equal protection of the laws, because they are substantially related to the important governmental objectives of preserving the family unit, protecting the child's legitimate status, and promoting the best interests of the child.

In A. v. X, Y, & Z, 641 P.2d 1222 (Wyo.), cert. denied, 103 S. Ct. 388 (1982), this Court denied certiorari in a case pre-

senting questions identical to those at issue in this appeal. In A. v. X, Y, & Z, the alleged natural father, A, brought an action to establish his paternity of a child, X. The parties admitted that in early November 1979, A and the child's mother, Y, had engaged in sexual relations. On February 8, 1980, the mother married another man, Z, and gave birth to the child on August 3, 1980. By operation of Wyoming law, the husband Z was presumed to be the child's father. The trial court dismissed the putative father's petition, holding that he lacked standing under the applicable statutes to assert his paternity. 641 P.2d at 1222.

On appeal, the alleged father argued that, because the statutes permitted a woman, married or single, to bring a paternity action against any man, but precluded a man

from establishing paternity of a child born to a married woman, the statutes denied equal protection of the law. The Wyoming Supreme Court reasoned that the distinction between an outsider to the family unit, such as a putative father, and an insider, such as a mother, justified the differential treatment. Accordingly, the court held that the statute did not violate equal protection guarantees, id. at 1226, and this Court denied review. Accord Petitioner F. v. Respondent R., 430 A.2d 1075, 1080 (Del. 1981).

The appellant's reliance on this Court's decisions in Caban v. Mohammed, 441 U.S. 380 (1979), and Stanley v. Illinois, 405 U.S. 645 (1972), is misplaced. Caban is inapposite for two reasons. First, the issue in that case was whether a statute allowing unwed mothers, but not unwed fathers, to ob-

ject to a child's adoption denied equal protection. The question of standing to assert paternity was not involved, and the governmental interest in promoting the adoption of illegitimate children differs significantly from the governmental interest involved in this case, that of maintaining the family unit and the child's status of legitimacy. Second, Caban is not factually analogous. Under Tennessee law, the natural father in Caban could have petitioned to legitimate the children born to the mother because she had been unmarried when the children were conceived and born. The fact that the father was married to another woman at the time would not have affected his standing to petition for legitimation. As for the Stanley decision, neither the family unit interest nor the children's legitimacy were at stake.

The illegitimate children's mother was dead, the state had custody of the children, and all parties conceded that the plaintiff was their father. These facts justified this Court's holding that the state interest underlying a statute which, upon the death of an unwed mother, automatically made her children wards of the state did not warrant differential treatment of married and unmarried couples. In this case, however, the substantial state interests and the presence of an acknowledged legal father justify differential treatment of mothers and putative natural fathers.

Because the classifications created by Tenn. Code Ann. §§ 36-302 and 36-224 are substantially related to the important governmental objectives of preserving the family unit, protecting the child's legitimate

status, and promoting the best interests of the child, they do not deny putative natural fathers equal protection of the laws. For this reason, the question presented by the appellant does not merit plenary review.

B. TENN. CODE ANN. § 36-302, AS INTERPRETED BY THE TENNESSEE COURT OF APPEALS, DOES NOT VIOLATE A PUTATIVE FATHER'S DUE PROCESS RIGHTS.

The appellant JAMES LAWRENCE CUNNINGHAM also argues that Tenn. Code Ann. § 36-302, as interpreted by the Tennessee Court of Appeals in Cunningham v. Golden, supra, denies an alleged natural father his due process right to a hearing on the issue of his paternity in contravention of the fourteenth amendment to the United States Constitution. (See Appellant's Jurisdictional Statement at 22-26) Because any constitutionally protected interest of a man claiming to be the father of a child born to a married woman is minimal at best, and compelling state interests justify denying such a person standing to legitimate the child, the statute as construed by the Tennessee

Court of Appeals does not violate due process guarantees.

In his Jurisdictional Statement, the appellant neither identifies the nature of his private interest nor demonstrates that the interest is within the fourteenth amendment's protection. The appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN assume that the appellant is alleging that he is constitutionally entitled to a hearing on the issue of his paternity because the right of a natural father to custody of his children is a substantial liberty interest protected by the due process clause.

The appellees recognize that the liberty interests protected by the due process clause include "the right of the individual . . . to marry, establish a home and bring up children . . . ." Meyer v.

Nebraska, 262 U.S. 390, 399 (1923), quoted in Board of Regents v. Roth, 408 U.S. 564, 572 (1972); see also Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862 (1977). The appellants also acknowledge that Stanley v. Illinois, supra, in which this Court invalidated on due process grounds a state statute which, upon the death of an unwed mother, automatically made her children wards of the state, has been broadly interpreted as recognizing that the interests of unwed fathers generally are entitled to constitutional protection. See Caban v. Mohammed, supra; Quilloin v. Walcott, 434 U.S. 246 (1978); Note, "Putative Fathers: Unwed, But No Longer Unprotected," 8 Hofstra L. Rev. 425 (1980). The general principle of Stanley does not mean, however, that a man claiming paternity has a constitu-

tionally protected interest in a determination of his parental status for purposes of obtaining custody or visitation rights with a child conceived and born during the marriage of the child's mother to another man who has not disavowed paternity. First, any liberty interest of a putative natural father in a child legally presumed to be the child of the mother's husband is much weaker than the interest of an unwed father in an illegitimate child whom all parties concede to be his own, as was the case in Stanley. Second, the competing state interests involved in the case of a legitimate child who has a mother and a legal father, such as promoting the marital relationship, maintaining the family unit, and protecting the child's legitimate status, are entirely absent from the case of an unwed father and his illegitimate child.

Thus, even if an alleged natural father such as the appellant had a constitutionally cognizable liberty interest in a child, his interest would be outweighed by the state interests at stake, and a statute that did not allow him standing to petition for the child's legitimation would not deny him due process of law. Accord Petitioner F. v. Respondent R., supra, 430 A.2d at 1078-79; A. v. X, Y, & Z, supra, 641 P.2d at 1226-27.

The appellants recognize that, under certain limited circumstances, a putative natural father's interest in a child born to a married woman may outweigh the state interests and entitle him to a hearing on the paternity issue. For example, in In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, cert. denied, 421 U.S. 1014 (1975), the trial court denied a putative

father standing to assert his paternity of a child born to a married woman, even though the woman and her husband were deceased and the child had become a ward of the state. The California Supreme Court reversed, holding that, because the state interests in promoting the marital relation and protecting the family unit could not be advanced in a case in which the child's mother and presumptive father were dead, the state was constitutionally required to afford the putative father a hearing.

In this case, however, the special circumstances of In re Lisa R. are not present. The minor child DANIEL TODD INMAN is not a ward of the state. Both his parents are living and contributing to his support and welfare, and both acknowledge their parentage and the child's legitimacy. Thus

the state interest in maintaining this arrangement outweighs any interest the appellant might have in establishing his paternity.

The appellant also argues that Tenn. Code Ann. § 36-302, as interpreted by the Tennessee Court of Appeals, terminates his parental rights without due process of law. (See Appellant's Jurisdictional Statement at 21-22, citing Lassiter v. Department of Social Services, 452 U.S. 18 (1981)). In the eyes of the law, the appellant is a stranger to the child, and has no parental rights with respect to the child. He cannot have his "parental rights" terminated when no court has determined that he has such rights. For this reason, the appellant's contention is wholly without merit. Accord Petitioner F. v. Respondent R., supra, 430 A.2d at 1079-80.

Because any constitutionally protected interest an alleged natural father may have in a child born to a married woman is outweighed by the compelling state interests in promoting the marital relation, maintaining the family unit, and protecting the child's status of legitimacy, a statute denying a putative father standing to assert his paternity does not deprive him of due process of law. For this reason, the question presented by the appellant does not merit plenary review.

CONCLUSION

For the foregoing reasons, the appellees JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN request this honorable Court to dismiss the appeal brought by JAMES LAWRENCE CUNNINGHAM.

Respectfully submitted,

JUDY BAKER INMAN GOLDEN,
STEVEN LEE INMAN,
Appellees,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March 1984 I forwarded by first class mail, postage prepaid, three copies of the foregoing Motion to Dismiss to each of the following:

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NO. 83-357

IN THE
SUPREME COURT OF THE UNITED STATES

1983 Term

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
and
STEVEN LEE INMAN,
Appellees.

APPEAL FROM THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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IN THE SUPREME COURT
OF THE UNITED STATES

JAMES LAWRENCE CUNNINGHAM,

Appellant,

v.

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES
MOTION TO DISMISS

Comes the Appellant, James Lawrence Cunningham, and in response to Appellees' Motion to Dismiss offers the following brief to be considered by the Court in determining the viability of Appellees' Motion.

First, Appellant has serious reservations about Appellees having obtained time extensions sufficient to timely file

its Motion to Dismiss, since Appellant nor Appellant's counsel have ever received any correspondence to indicate Appellees were seeking any time extensions. In fact, since filing his jurisdictional statement on August 29, 1983, Appellant had not received any material from Appellees until receiving their Motion to Dismiss on March 27, 1984. Under Rule 16 of the Rules of the Supreme Court, the Appellees must within 30 days after receipt of the jurisdictional statement file their Motion to Dismiss, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk of the Court under the provisions of Rule 29.4. Appellant argues that this nearly six month delay past the filing deadline in unjustified, especially considering the nature of the case at bar. Furthermore, having never received

any correspondence between Appellees and the Clerk of the Court applying for an extension of time, Appellant was denied the right under Rule 29.4 to request that said application be submitted to a Justice or to the Court. Also, during numerous contacts with the Clerk of the Court inquiring as to the status of the Appeal, no mention was made that Appellees had filed an application for extension of time, and Appellant was informed only of one informal extension which expired on January 23, 1984. Therefore, Appellant urges Appellees' Motion to Dismiss be denied as untimely.

In their Motion to Dismiss, Appellees contend that Appellant assumes the existence of facts never established in a judicial proceeding (Motion to Dismiss, p. 6), but do not enumerate any such facts. Appellant argues that all facts contained in its Jurisdictional Statement were established

in the record and would welcome Appellees to point out the facts of which they speak. Next, the Appellees argue that the Appellant lacks standing to argue constitutional issues on behalf of the Appellant's minor child, Daniel Todd Inman. (Motion to Dismiss, p. 6). Appellees, having never raised this issue at the trial level, should be precluded from doing so at this stage in the proceedings. Appellees also contend that Appellant is a "stranger" to the family unit (Motion to Dismiss, p. 17), when, in fact, Appellant was essentially a de facto husband, having cohabited with Appellee Golden before conception, after conception, and for some 2½ years after the birth of Daniel Todd Inman. During this time, Appellant performed all the usual parental duties of a father and husband, and filed his Petition for Legitimation less than four months after Appellee Golden left the

Appellant's household taking their minor son with her.

Appellees argue that Appellant would disrupt the family unit and bastardize the child, and that the child would gain nothing thereby. (Motion to Dismiss, p. 17). Appellant contends this arguement is without merit in the case at bar, since the Appellant would not be disrupting the family unit, since the Appellees were divorced shortly after the birth of the minor child in question. Also, the child would not be "bastardized", as next asserted by Appellees (Motion to Dismiss, p. 17), as Appellant seeks to legitimate his son as a step to reestablish their substantial relationship.

Appellees assert that Frazier v. McFerren, 55 Tenn App 431, 402 SW2d 467 (1964), was founded on the principle that the legal father was unwilling or unable to support the child. Appellant

argues that these facts were not present in Frazier and that the Appellees are merely attempting to contrast the case at bar with Frazier by relying on non-existent facts. Appellees further contend a member of the family unit is in the best position to judge whether disruption of the family unit would be in the child's best interests. (Motion to Dismiss, pp. 17-18). This viewpoint is clearly in contrast to Justice O'Connor's concurring opinion in Mills v. Habluetzel, 456 US 91 (1982), where she stated "the mother's and child's interests are not congruent". (456 US 91, 105, n.4).

Appellees throughout their Motion to Dismiss constantly make the distinction between an outsider and insider to the family unit. In the case at bar, the Appellant is not an outsider to the family unit, and in fact, in a medical information form, Appellee Golden admitted the

Appellant was the father of Daniel Todd Inman, and the interviewing pediatric nurse described the family relation as "parents very loving of child and vice versa". Having established a substantial relationship with the child, the Appellant is clearly an "insider" and by the Appellees own rationale gives him substantial rights as to the minor child, Daniel Todd Inman.

Appellees make a broad generalization that "in the eyes of the law, the Appellant is a stranger to the child" (Motion to Dismiss, p. 30), but nowhere do the Appellees point to any law they are relying on in making this statement, and in any event the case at bar is a far cry from any case law that Appellees rely on. Appellees argue that the case of A v. X, Y, and Z, 641 P2d 1222 (Wyo.), cert. denied, 103 SCt 388(1982), presents questions identical to the issue in this appeal, (Motion

to Dismiss, pp. 18-19), and rely heavily upon the fact that in a 6-3 decision this Court denied certiorari in that case. (Justices Brennan, White, and Blackmun would have granted certiorari). Appellant contends that the case at bar is appreciably different from A v. X, Y, and Z, since A never formed any relationship with the child so as to merit the constitutional protection afforded in Stanley v. Illinois, 405 US 645 (1972). A simply had a sexual relationship with Y some three months before she married Z. Then, some six months later the child (X) was born. Also, there is no indication that A supported Y after conception or X after birth. Therefore, A was merely in the position of Leon Quillion in Quillion v. Walcott, 434 US 253 (1978). Mr. Quillion also had never established a home with the minor child or the mother, and likewise never claimed any relationship with the minor child, as the mother

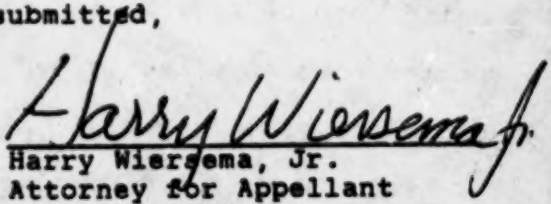
had exclusive custody and control of the child for its entire life. Unlike A or Leon Quillion, Appellant had formed a substantial relationship with the minor child, Daniel Todd Inman, and had supported both Appellee Golden and their child for some 2½ years.

This Court heard Quillion because those less compelling facts still required that this Court find a substantial question and grant jurisdiction, even though Quillion did not raise an equal protection question. Certainly, the facts of the ca e at bar are compelling enough for this Court to find a substantial question, as Stanley requires deference to "the interest of a man in the children he has sired and raised, absent a powerful counterveiling interest". (405 US at 651).

For the reasons stated above, Appellant respectively requests that Appellees' Motion to Dismiss be denied, and the Court

find that this case presents substantial equal protection and due process questions, worthy of the Court's jurisdiction.

Respectfully submitted,



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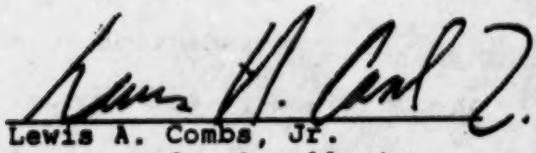

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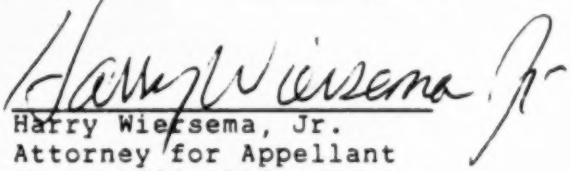
I hereby certify that a true and exact copy of the foregoing Brief in Opposition To Appellees Motion To Dismiss has been mailed with the postage prepaid to the Attorney General of the State of Tennessee, William M. Leech, Jr., 450 James Robertson Parkway, Nashville, Tennessee 37219; Wilson S. Ritchie, Suite 2301, Plaza Tower, Knoxville, Tennessee 37929-2301, attorney for Appellee Judy Baker Inman Golden; and Frank L. Flynn, Suite 600, Walnut Building, Knoxville, Tennessee 37901, attorney for Steven Lee Inman, this day of April, 1984.



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